Chan Kwai Foong v Dato' Capt Mohd Najib bin Abdullah

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-1963–12 OF 2015
LIM YEE LAN, BADARIAH SAHAMID AND HARMINDAR SINGH JJCA
12 JANUARY 2017

Land Law — Indefeasibility of title and interests — Sale of property by developer/owner to two different owners — Property first sold to respondent and 19 years later to appellant — Respondent claimed better title to property — Whether appellant bona fide purchaser for value — Whether s 340(3) of the National Land Code applied to present case — Whether respondent acquired indefeasible title to property — Whether appellant had burden of proving that she was bona fide purchaser of property — Whether appellant discharged burden — Whether developer/owner became bare trustee of property after respondent/purchaser paid purchase price — Whether developer/owner had legal capacity to enter into any agreement with appellant — Whether sale and purchase agreement between developer/owner and appellant void — Whether respondent rightful owner of property

On 19 September 1989, Dato' Capt Mohd Najib bin Abdullah ('the respondent') had purchased a studio apartment at Menara Seputeh ('the property') from the developer/owner, Natarjaya Sdn Bhd ('Natarjaya') for a sum of RM57,540. In March 2012, the respondent returned from residing overseas. He was then shocked to discover that Chan Kwai Foong ('the appellant') was the registered owner of the property. The respondent lodged a police report and a caveat on the property. The respondent also learned that the appellant had also executed a sale and purchase agreement ('the SPA') with Natarjaya and had paid the full purchase price of RM45,000 to the latter. It also transpired that when the respondent discovered this double sale, the appellant was in the process of selling the property to one Kenneth Tan. The plaintiff filed a civil suit against Natarjaya, the two directors of Natarjaya, the appellant, Kenneth Tan and the Pendaftar Hakmilik Tanah Wilayah Persekutuan KL. The trial judge found that as Natarjaya and its directors had not entered an appearance, the respondent's claim against them, which was based on fraud, had been proved. The trial judge also found that the appellant was not a party to the fraud committed by Natarjaya and its directors, but that since she was not able to prove that she was a purchaser in good faith, her title was defeasible at the instance of the respondent. The respondent's claim against Kenneth Tan was however dismissed because the latter was never registered as a proprietor of the property. Consequently, the respondent's claim was allowed and he became the registered proprietor of the property and Natarjaya and its directors were

ordered to pay general and exemplary damages to the respondent. This was the appellant's appeal against the decision of the High Court. The appellant submitted that the trial judge had erred when he required her to prove that she was a bona fide purchaser for valuable pursuant to s 340(3) of the National Land Code ('the Code'). The appellant argued that s 340(3) of the Code only applied to subsequent purchasers and that being an immediate purchase she would fall under s 340(2) of the Code.

Held, dismissing the appeal with costs:

(1) The trial judge was right to assert that the appellant had the burden of proving that she was a bona fide purchaser of the property, especially since the appellant had not testified in court but had given a power of attorney to her solicitor ('DW2'), through whom documentary evidence was tendered. The appellant relied entirely on two documents, namely a document from Natarjaya confirming that it was the registered owner of the property and a copy of the strata title showing Natarjaya as the registered proprietor. As against this documentary evidence was the fact that the purchase price of RM45,000 paid by the appellant was significantly lower than the price paid by the respondent some 20 years ago of RM57,450. Since the property was being offered for sale at a suspiciously low price, there was a duty on the part of the appellant to provide a reasonable explanation for the discrepancy. Instead the appellant had chosen to provide no explanation. Given the facts and circumstance in the case, it would be fair to surmise that the failure of the appellant to testify would not only discredit her case but strengthen the respondent's case. Thus, the trial judge was more than entitled to come to a finding that the appellant had failed to discharge the burden of showing that she was a purchaser in good faith and for valuable consideration (see paras 25–29).

(2) It is settled law now that the true legal position is that once the purchaser had paid the purchase price, he became the beneficial owner of the property with the vendor holding the legal title to the property as a bare trustee for the purchaser. When this legal principle was applied to the present case it was plain that the developer Natarjaya, after receiving the purchase price and surrendering possession of the property to the respondent, became a bare trustee for the respondent. Accordingly, Natarjaya had no legal capacity to enter into any agreement with the appellant. However, subsequent purchasers could still acquire an indefeasible title pursuant to s 340(3) of the Code, if they could show that the title or interest was acquired in good faith and for valuable consideration. In the present case, it was common ground that the appellant was not subsequent but an immediate purchaser (see paras 30–36).

(3) In the present case, the trial judge was entitled to rule as he had that the finding of fraud was taken to have been proved against Natarjaya and its directors, and that this finding would also be binding on the other defendants in the action. This finding further confirmed the legal position that the appellant could not have obtained good title from Natarjaya and that the SPA entered into between Natarjaya and the appellant was void. The net effect was that the appellant was disentitled to the property and the respondent should remain its rightful owner (see paras 39–40).

[Bahasa Malaysia summary

Pada 19 September 1989, Dato' Capt Mohd Najib bin Abdullah ('responden') telah membeli sebuah pangsapuri studio di Menara Seputeh ('hartanah') daripada pemaju/pemilik, Natarjaya Sdn Bhd ('Natarjaya') bagi jumlah RM57,540. Pada Mac 2012, responden kembali daripada menetap di luar negara. Dia terperanjat apabila mendapat tahu Chan Kwai Foong ('perayu') adalah pemilik berdaftar hartanah. Responden juga mendapat tahu perayu telah memasuki satu perjanjian jual beli ('PJB') dengan Natarjaya dan membayar harga belian penuh sebanyak RM45,000 kepada Natarjaya. Responden seterusnya mendapat tahu bahawa dalam jualan berganda ini, perayu dalam proses menjual hartanahnya kepada seorang bernama Kenneth Tan. Plaintif memfailkan guaman sivil terhadap Natarjaya, dua orang pengarah Natarjaya, perayu, Kenneth Tan dan Pendaftar Hakmilik Tanah Wilayah Persekutuan KL. Hakim bicara memutuskan bahawa kerana Natarjaya dan pengarah-pengarahnya tidak merekodkan kemasukan, tuntutan responden terhadap mereka, yang berdasarkan penipuan, berjaya dibuktikan. Hakim bicara memutuskan lagi bahawa perayu bukan pihak dalam penipuan yang dilakukan oleh Natarjaya dan pengarah-pengarahnya tetapi kerana dia tidak dapat membuktikan bahawa dia bukan pembeli suci hati, hakmiliknya boleh disangkal oleh responden. Tuntutan responden terhadap Kenneth Tan walau bagaimanapun ditolak kerana Kenneth Tan tidak didaftarkan sebagai pemilik hartanah. Seterusnya, tuntutan responden dibenarkan dan dia menjadi pemilik berdaftar hartanah dan Natarjaya dan pengarah-pengarahnya diperintahkan membayar ganti rugi am dan teladan kepada responden. Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi. Perayu menghujahkan bahawa hakim bicara terkhilaf apabila beliau mengkehendaki agar perayu membuktikan bahawa dia pembeli bona fide dengan nilai bawah s 340(3) Kanun Tanah Negara ('Kanun'). Perayu menghujahkan bahawa s 340(3) Kanun hanya terpakai kepada pembeli seterusnya dan sebagai pembeli langsung, dia terjumlah bawah s 340(2) Kanun.

Diputuskan, menolak rayuan dengan kos:

(1) Hakim bicara bertindak betul dalam menegaskan bahawa perayu memikul beban membuktikan bahawa dia adalah pembeli bona fide

hartanah, khususnya kerana perayu tidak memberi keterangan di mahkamah tetapi memberi surat kuasa wakil kepada peguamnya ('DW2') yang melaluinya keterangan dokumentari dikemukakan. Perayu bergantung sepenuhnya pada dua dokumen iaitu dokumen daripada Natarjaya yang mengesahkan bahawa dia adalah pemilik berdaftar hartanah dan sesalinan hakmilik strata yang menunjukkan Natarjaya ialah pemilik berdaftar. Terhadap keterangan dokumentari tersebut adalah fakta bahawa harga belian RM45,000 dibayar oleh perayu adalah sangat rendah berbanding harga yang dibayar oleh responden lebih kurang 20 tahun lalu iaitu sebanyak RM57,450. Memandangkan hartanah ditawarkan pada harga yang sangat rendah dan mencurigakan, perayu bertanggungjawab memberi penjelasan yang munasabah bagi kepincangan itu. Sebaliknya, perayu memilih untuk tidak memberi apa-apa penjelasan. Melihat pada fakta dan hal keadaan kes ini, adil untuk menyimpulkan bahawa kegagalan perayu memberi keterangn bukan sahaja menjejaskan kesnya malah menguatkan lagi kes responden. Oleh itu, hakim bicara lebih daripada berhak untuk menyimpulkan bahawa perayu gagal melepaskan beban untuk menunjukkan bahawa dia adalah pembeli bona fide dan bagi satu balasan bernilai (lihat perenggan 25–29).

(2) Adalah undang-undang mantap bahawa kedudukan undang-undang sebenar adalah apabila pembeli telah membayar harga belian, dia menjadi pemilik benefisial hartanah dengan penjual memegang hakmilik sah hartanah sebagai pemegang amanah bagi pihak pembeli. Apabila prinsip perundangan ini dipakai pada kes ini, jelas bahawa pemaju Natarjaya, selepas menerima harga belian dan menyerahkan milikan hartanah kepada responden, menjadi pemegang amanah responden. Dengan itu, Natarjaya mempunyai kapasiti bawah undang-undang untuk memasuki mana-mana perjanjian dengan perayu. Walau bagaimanapun, pembeli terkemudian masih boleh mendapat hakmilik boleh sangkal bawah s 340(3) Kanun jika mereka boleh menunjukkan bahawa hakmilik atau kepentingan diperoleh dengan suci hati dan bagi balasan bernilai. Dalam kes ini, jelas bahawa perayu bukan pembeli terkemudian tetapi pembeli langsung (lihat perenggan 30–36).

(3) Dalam kes ini, hakim bicara berhak memutuskan seperti yang diputuskan oleh beliau bahawa penipuan berjaya dibuktikan terhadap Natarjaya dan pengarah-pengarahnya, dan bahawa dapatan ini mengikat defendan-defendan dalam tindakan ini. Dapatan ini seterusnya mengesahkan kedudukan undang-undang bahawa perayu tidak boleh mendapat hakmilik sah daripada Natarjaya dan bahawa PJB yang dimasuki antara Natarjaya dan perayu tidak sah. Kesannya adalah bahawa perayu tidak berhak terhadap hartanah tersebut dan responden kekal sebagai pemilik sebenar (lihat perenggan 39–40).]

Notes

For cases on indefeasibility of title and interests in general, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3725–3902.

Cases referred to

Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors [2014] 2 MLJ 768; [2014] 1 CLJ 987, FC (refd)

Lysaght v Edwards (1876) 2 Ch D 499, ChD (folld)

M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294, CA (refd)

Ong Chat Pang & Anor v Valliappa Chettiar [1971] 1 MLJ 224, FC (not folld)

Overseas Realty Sdn Bhd v Wong Yau Choy & Ors; Tetuan Tay Ibrahim & Partners (Third Party) [2014] MLJU 1868; [2014] 8 CLJ 107, HC (refd)

Samuel Naik Siang Ting & Ors v Public Bank Bhd [2015] 6 CLJ 914, CA (refd)

Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1; [2015] 8 CLJ 944, FC (folld)

Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)

Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors [1983] 1 MLJ 81, FC (refd)

Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)

Tan Ong Ban v Teoh Kim Heng [2016] 3 MLJ 23; [2016] 3 CLJ 193, FC (folld)

Tan Yin Hong v Tan Sian Sang & Ors [2010] MLJU 12; [2010] 2 CLJ 269, FC (folld)

Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors [1974] 2 MLJ 45, FC (refd)

Legislation referred to

Land Code (FMS Cap 138) s 42

National Land Code ss 340, 340(2), (2)(a), (2)(b), (3), 417

Appeal from: Civil Suit No 21NCVC-9–02 of 2014 (High Court, Kuala Lumpur)

Justin Chin (Bani Prakash with him) (Bani Prakash & Co) for the appellant.
Harjinder Singh Sandhu (Akberdin & Co) for the respondent.

Harmindar Singh JCA:

INTRODUCTION

[1] This appeal concerns the sale of property by the developer/owner to two different purchasers some 19 years apart. The main issue here is which of the two purchasers has a better claim to the property.

[2] The property concerned is held under Geran Strata 111459/M1/3/7 Lot No 375, Seksyen 99, No Petak 7, No Tingkat 3, No Bangunan M1, Bandar Kuala Lumpur Daerah Wilayah Persekutuan ('the property'). The subject property in question bears the postal address of No 307, Menara Seputeh, Jalan Klang Lama 58000 Kuala Lumpur.

[3] After a full trial with witnesses, the High Court had allowed the plaintiff's claim. The plaintiff was the first purchaser of the said property. The fourth defendant, who was the second purchaser, has now filed this appeal against the decision of the High Court at Kuala Lumpur given on 23 October 2015.

[4] At the hearing of the appeal on 19 April 2016, and after having read the written submissions as well as hearing oral arguments on the issues raised, we indicated to the parties that we would deliver our decision on a date to be informed. In the meantime, parties were to furnish the court with further research on the application of s 340 of the National Land Code ('the NLC'). Having been apprised of the position, this is now our unanimous decision.

[5] It is pertinent to note that only the fourth defendant now appeals to this court. For convenience the parties will be referred to as they were in the High Court.

THE FACTUAL BACKGROUND

[6] The relevant facts leading to the filing of the suit are well set out in the judgment of the High Court and can be summarised as follows. On 19 September 1989 the plaintiff purchased the property, a studio apartment at Menara Seputeh, from the developer Natarjaya Sdn Bhd ('Natarjaya') for a sum of RM57,540. Natarjaya is the first defendant. The second and third defendants are directors of Natarjaya.

[7] To finance this purchase, the plaintiff took a loan from BBMB Kewangan Bhd. On 12 December 2007, the plaintiff entered into a deed of receipt and reassignment ('the R&R') with his financier CIMB Bank (the successor entity of BBMB Kewangan Bhd) given that the facility taken by the

plaintiff to finance the purchase of the property was fully settled by him. Accordingly the full purchase price was paid to the developer Natarjaya as found by the learned judge.

[8] The plaintiff had for many years resided in South Korea. He returned in 2012. On or about 8 March 2012, the plaintiff went to clean the said property. Upon arrival at the property he discovered that the padlock and the wooden door had been changed without his knowledge. He then lodged a police report.

[9] Upon a search of the strata roll the plaintiff discovered that there had been an entry by a person named Chan Kwai Foong (the fourth defendant) as the registered owner of the said property. The plaintiff was shocked as he had never consented to have the property transferred to anyone. He then lodged another police report. He also informed the Land Office and lodged a caveat on the property on 12 March 2012.

[10] It also turned out that the fourth defendant had executed a sale and purchase agreement with the first defendant ('Natarjaya') on 8 September 2008. The title was registered in the fourth defendant's name on 19 December 2008. The fourth defendant had paid the full purchase price of RM45,000 to the first defendant. For this purchase, the fourth defendant was represented by the legal firm of Messrs SK Ling & Partners.

[11] It also transpired that when the plaintiff discovered this double sale, the fourth defendant was in the process of selling the property to the fifth defendant for a sum of RM95,000. A sum of RM45,000 had been paid and the balance was to be paid upon the removal of the plaintiff's caveat. It seemed that this sale was thwarted by the civil action filed by the plaintiff.

AT THE HIGH COURT

[12] The claim against Natarjaya and its directors (the first to third defendants) was based on fraud. No appearance had been entered by them. Relying on the authority of *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768, the learned judicial commissioner ('the JC') took the position, and correctly if we might add, that since no appearance had been entered, fraud had been proved against the first to third defendants and this finding would be binding on the other defendants in the action.

[13] At the end of the trial and after hearing submissions, the learned JC came to the following findings which appear in his judgment:

(a) s 340 of the National land Code ('the NLC') may be invoked not just by a former registered proprietor but also a beneficial owner based on the

authority of *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224 and *Samuel Naik Siang Ting & Ors v Public Bank Bhd* [2015] 6 CLJ 914 (CA);

(b) the plaintiff has failed to prove that the fourth defendant was a party or privy to the fraud committed by the first to third defendants. Accordingly, the fourth defendant's title is not defeasible under s 340(2)(a) of the NLC;

(c) based on the authority of *Ong Chat Pang*, an immediate purchaser who was not implicated in any fraud can obtain an indefeasible title if he can show that he was a purchaser in good faith for valuable consideration within the meaning of the proviso to s 340(3) of the NLC;

(d) on the facts, the fourth defendant was not able to satisfy the court that she was a purchaser in good faith and for valuable consideration. As a consequence, the title of the fourth defendant was defeasible at the instance of the plaintiff; and

(e) no case could be made against the fifth defendant as he was never registered as a proprietor of the said property. Accordingly the plaintiff's claim against the fifth defendant was dismissed.

[14] As a consequence of these findings, judgment was entered as follows:

(a) in exercise of the powers under s 417 of the NLC, the sixth defendant is directed to effect transfer of the said property to the plaintiff and to record the plaintiff as the registered proprietor;

(b) the first to third defendants are liable to the plaintiff for general and exemplary damages to be assessed by the registrar of the court together with pre-judgment and post judgment interest at a rate of 5%pa;

(c) each of the first to fourth defendants to pay costs of RM30,000 to the plaintiff; and

(d) no order as to costs in respect of the fifth and sixth defendants.

OUR DECISION

[15] The main issue before us was whether the learned JC was in error when he required the fourth defendant to prove that she was a bona fide purchaser for valuable consideration pursuant to s 340(3) of the NLC. This issue arises as the fourth defendant contends that s 340(3) applies only to subsequent purchasers whereas the fourth defendant, being an immediate purchaser, falls under s 340(2) of the NLC.

[16] In this connection, much reliance was placed on the Federal Court

decision in *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768; [2014] 1 CLJ 987 ('Kamarulzaman'), and in particular the following passage (at pp 797–798 (MLJ); p 1025 (CLJ)):

> Before we adjourn, we would summarise the foregoing and pass on the following, as a guide to trial courts. Whenever a registered title or interest is sought to be set aside under s 340, first ascertain whether the tile or interest under challenge is registered in the name of an immediate purchaser or a subsequent purchaser. If the title or interest is registered in the name of an immediate purchaser is still liable to be set aside if any of the vitiating elements as set out in s 340(2) has been made out. If the title or interest is registered in the name of a subsequent purchaser, then the vitiating elements in s 340(2) would not affect the title or interest of a *bona fide* subsequent purchaser. The tile or interest of a subsequent purchaser is only liable to be set aside if the subsequent purchaser is not a *bona fide* subsequent purchaser. The title or interest acquired by a subsequent purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a subsequent purchaser, is indefeasible.

[17] It is interesting to note that *Kamarulzaman* was also a case of land fraud. There it was found that the first to fourth respondents had acquired the title to the property in question through fraud and misrepresentation. The said property was then transferred to the fifth and sixth respondents who claimed that they had acquired an indefeasible title as they were bona fide purchasers.

[18] Now it is significant that in *Kamarulzaman*, there appeared to be no discussion as to whether the fifth and sixth respondents were party or privy to the fraud, after having been determined to be the immediate purchasers. The proposition advanced by the Federal Court was that the shield of indefeasibility was not available to the immediate purchaser.

[19] The following is how the Federal Court dealt with this issue (at pp 796–797 (MLJ); p 1024 (CLJ)):

> In the instant case, both the trial court and the Court of Appeal held that the fifth and sixth respondents were bona fide purchasers. But unfortunately, both the trial court and the Court of Appeal failed to inquire whether the fifth and/or sixth respondents were immediate or subsequent purchasers. Only a subsequent purchaser is entitled to raise the shield of indefeasibility. An immediate purchaser of a title tainted by any one of the vitiating elements acquires a title that is not indefeasible. It flows from *Tan Ying Hong* that the bona fides of an immediate purchaser is not a shield to defeasibility. The defeasible title of a bona fide immediate purchaser is still liable to be set aside. The defeasible title of a bona fide immediate purchaser only becomes indefeasible when it is subsequently passed to a bona fide subsequent purchaser. That the fifth and sixth respondents were bona fide purchasers could not by the fact alone give a shield of indefeasibility. The fifth and or sixth respondents only acquired an indefeasible title if they were bona fide subsequent purchasers, there must have been an immediate purchaser in the first place. The first to fourth respondents, from whom the fifth and sixth respondents

obtained title, were not immediate purchasers. Rather, they were imposters of those entitled to the estate of the deceased. They, like the fake Boonsom who impersonated the true Boonsom, had no title to pass to the fifth and sixth respondents. The fifth and sixth respondents who were the immediate purchasers, acquired a title that was not indefeasible. But when the fraudulent title of the first to fourth respondents were set aside by the default judgment, the defeasible title of the fifth and sixth respondents was also defeated.

[20] The learned JC in the instant case, however, relied on the well-known Federal Court case of *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224 ('*Ong Chat Pang*'), a case which has invited much debate concerning the extent of equitable intervention in the Torrens system.

[21] *Ong Chat Pang* was another case involving land fraud with somewhat similar facts as the instant case. In that case, the first and second defendants, the registered proprietors of the land in question, contracted to sell the said land to the plaintiff. The plaintiff later discovered that subsequent to his contract with the first and second defendants, the said land had been transferred by them to the third and fourth defendants. The plaintiff brought an action against all the defendants for specific performance of his contract and for an order that the registration in favour of the third and fourth defendants be cancelled and a transfer effected to himself. The High Court gave judgment for the plaintiff.

[22] In the Federal Court, both Suffian FJ and Gill FJ in separate judgments affirmed the decision of the High Court. The decision was based on s 42 of the then FMS Land Code. This provision although worded differently has the same legal effect as the present s 340 of the NLC as was decided in *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81.

[23] Interestingly in *Ong Chat Pang*, the third and fourth defendants had knowledge of the prior contract of sale but nevertheless proceeded to obtain registration of the said land for themselves and at the trial claimed indefeasibility of title. Although some adverse comments were made as to the unconscionable conduct of the third and fourth defendants, both Suffian FJ and Gill FJ affirmed the trial court's finding that there was no fraud on their part. The Federal Court in the end dismissed the appeal on the ground that the third and fourth defendants had failed to prove that they were bona fide purchasers for value.

[24] Coming back to the instant case, the learned JC similarly held that there was no independent evidence or objective facts in the case that could support the allegation of fraud except perhaps the fact that the purchase price was only RM45,000 when the initial purchase price paid by the plaintiff some 20 years ago was RM57,540. The fourth defendant had then purported to sell the said

property to the fifth defendant for a sum of RM95,000. The learned JC nevertheless considered that this in itself was insufficient to discharge the burden of proof of fraud on a balance of probabilities based on the recent decision of the Federal Court in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584. As the plaintiff did not challenge this finding on appeal, we have no reason to interfere with the learned JC's decision in this regard.

[25] Relying on the case of *Ong Chat Pang*, the learned JC went on to consider if the fourth defendant was a purchaser in good faith and for valuable consideration. In this regard, we have no quarrel with the finding of the learned JC that the fourth defendant was not such a bona fide purchaser as recognised by the law although we will come back to the question of whether this was the appropriate approach to be adopted.

[26] In any case, the learned JC was right to assert that the burden of proving such bona fide was on the fourth defendant who curiously did not testify in court but had given a power of attorney to DW2, through whom documentary evidence was tendered. The law in this regard, as was duly noted by the learned JC, was summarised in the case of *Overseas Realty Sdn Bhd v Wong Yau Choy & Ors; Tetuan Tay Ibrahim & Partners (Third Party)* [2014] MLJU 1868; [2014] 8 CLJ 107 as follows (at p 121):

> Now who is a good faith purchaser or sometimes known as a *bona fide* purchaser has been considered in a number of cases. In *State Tailor Sdn Bhd v Nallapan* [2005] 2 MLJ 589; [2005] 2 CLJ 167 the Court of Appeal held that the basic element of good faith is the absence of fraud, deceit or dishonesty and the knowledge or means of knowledge of such at the time of entry into a transaction but the overriding consideration is the particular circumstances of each case (per Richard Malanjum JCA (as he then was) at p 184).
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> In another Court of Appeal decision in *Au Meng Nam & Anor v Ung Yak Chew & Ors* [2007] 5 MLJ 136; [2007] 4 CLJ 526, Raus Shariff JCA (as he then was) in a separate but supporting judgment held that a purchaser in good faith does not include a purchaser who is careless or who had been negligent. His Lordship took the view that a subsequent purchaser was 'under an obligation to investigate properly all matters relating to the sale of the said land and not to just blindly accept what was claimed by the vendor as correct and genuine'. When the purchaser 'failed to take the ordinary precautions which ought to be taken in such a matter he is not entitled to the protection of the court' (at p 554).
>
> It may therefore be surmised that in order to prove there was bona fide purchase what is required of the purchaser is to establish that there was an honest dealing or honest conduct in the acquisition of any title or interest in any property (see also *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224; [1971] 1 LNS 96). In this regard, there is a duty to make the necessary enquiries regarding the dealing as the particular circumstances of the case demands so as to acquire knowledge of the improper conduct. Any person who in the circumstances ought to have made

the necessary inquiries but fails to do so may be guilty of willful blindness or voluntary ignorance such that it would amount to unfair conduct. Even carelessness or negligence in doing so would disentitle the subsequent purchaser to the title or interest of any such property. It cannot be gainsaid that the duty to do so cannot be a light one as otherwise gross injustice would befall the innocent owner of the land.

[27] We note that in order to discharge this burden, the fourth defendant relied entirely on two documents. The first was a document from Natarjaya dated 10 September 2008 where Natarjaya confirmed that it was the registered owner of the property in question. The second was a copy of the strata title showing Natarjaya as the registered proprietor.

[28] As against this was the evidence that was alluded to earlier in that the purchase price of RM45,000 paid by the fourth defendant was significantly lower than the price paid by the plaintiff some 20 years ago of RM57,450. This was also half of the selling price to the fifth defendant. The fourth defendant herself did not turn up to give evidence. In the end, no evidence was tendered to explain why the purchase price was significantly lower than the price paid by the plaintiff.

[29] As we had observed earlier, the absence of the fourth defendant at the trial was risky as the burden was on her to establish that she was a purchaser in good faith and for valuable consideration. The presence of her attorney, DW2, apart from tendering the documents as mentioned earlier, was on the whole useless. As DW2 candidly admitted, he did not have the requisite knowledge. As the said property was being offered for sale at a suspiciously low price, there was a duty on the part of the fourth defendant to make the necessary enquiries and to investigate all matters relating to the sale. The surrounding facts and circumstances relating to the sale were peculiarly within the knowledge of the fourth defendant. It cannot be right that no consequences follow a defendant's failure to testify on matters within his or her knowledge. At least, a reasonable explanation must be provided if no such enquiries were made. Instead the fourth defendant has chosen to provide no explanation. Given the facts and circumstances in the case, it would be fair to surmise that the failure of the fourth defendant to testify would not only discredit her case but strengthen the plaintiff's case (*Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381).

[30] The upshot is that the learned JC was more than entitled to come to a finding that the fourth defendant had failed to discharge the burden of showing that she was a purchaser in good faith and for valuable consideration. This burden, as alluded to earlier, is not a light one as the consequences are serious,

including loss of ownership by a previous legitimate owner of the property, an owner who may have done nothing wrong to disentitle him or her to the property.

[31] Be that as it may, we have alluded to the findings of the learned JC on the question of whether the fourth defendant was a bona fide purchaser purely for the sake of completeness. We are constrained to hold that the learned JC need not have relied on the case of *Ong Chat Pang* as the law in this regard has since moved on and taken a different turn with the Federal Court cases of *Tan Yin Hong v Tan Sian Sang & Ors* [2010] MLJU 12; [2010] 2 CLJ 269 and *Kamarulzaman* which appear to take the position that an immediate purchaser is not entitled to rely on any claim of being a purchaser in good faith and for valuable consideration.

[32] In its stead, the law now, as the learned JC himself duly noted, is that once the plaintiff had paid the purchase price, he became the beneficial owner of the property with the vendor holding the legal title to the property as a bare trustee for the plaintiff.

[33] That this in fact is the true legal position has been established in a long line of cases beginning with the oft-quoted case of *Lysaght v Edwards* (1876) 2 Ch D 499 where Jessel MR observed (at p 506):

> ... the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the lime Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession.

[34] This 'bare trustee' principle, as we would call, was approved by the Federal Court in *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45 where Ong Hock Sim FJ held (at p 47):

> The law is clear that the vendors, after receipt of the purchase price and surrender of possession of the said land to the appellants are bare trustees for the appellants of the said land and it must consequently follow, as night must day, that the vendors have no interest in the lands that can be the subject matter of a caveat.

[35] This principle received further approval in two recent Federal Court cases — *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; [2015] 8 CLJ 944 ('*Samuel Naik*') and *Tan Ong Ban v Teoh Kim Heng* [2016] 3 MLJ 23; [2016] 3 CLJ 193. Of interest is the *Samuel Naik* case as the facts are

relevant to the instant appeal. In speaking for the Federal Court, Ramly Ali FCJ held (in the head-notes (CLJ)):

(3) It is settled law that after receipt of the full purchase price and the surrender of possession of the lands to the purchasers, the vendors of the land became bare trustees. It was thus clear that MPM, being the registered proprietor of the land after executing the SPAs with the earlier purchasers and having received the full purchase price, was a bare trustee (that is, a person without beneficial interest in the property). In other words, MPM in the present case, was not permitted in law to sell or transfer the land to the new purchasers, including the appellant. Thus, the Court of Appeal was correct in its finding that the subsequent sale of the lots by MPM to the new purchasers (including the appellant) were void *ab initio*, as MPM did not have any legal or requisite capacity to enter into such agreements. (paras 46–54)

(4) The issue of indefeasibility of little and interest in alienated land is governed by s 340 of the NLC. Under s 340(2)(b), the title or interest of any person for the time being registered as proprietor of any alienated land shall not be indefeasible where the registration was obtained by means of an insufficient or void instrument. In the present case, the undisputed facts of the case clearly showed that the SPAs as well as the deeds of assignment with the earlier purchasers were valid and enforceable; and the subsequent SPAs with the new purchasers (including the appellant) were void *ab initio* and of no effect. It followed that their related transfer forms ('Forms 14A') should also be void and ineffective to create a registrable transfer. The agreed and undisputed facts of the case support the finding that there was sufficient evidence to show that the said form 14A was in fact a void instrument. (paras 61–70)

[36] The circumstances in which a purchaser of land may fail to obtain a good title was amply explained by Wan Yahya SCJ in the then Supreme Court case of *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 when in speaking for the court, His Lordship observed (at p 309):

> A purchaser of land might fail to obtain a good title in two distinct ways. First, if the title of the vendor is bad. Secondly, even if the vendor has a good title, there might be some invalidating defects in the conveyance or transaction in which the purchaser attempted to obtain the title. These transactions might be void or voidable for a variety of reasons. In the case of a defect in the vendor's title, the common law rule is that no person can give a better title than he had — *nemo dat quod non habet*. There are, however, important exceptions to this rule, in particular the qualification made under the proviso to s 340(3) of the NLC where a bona fide purchaser for value without notice of the defeasible nature of the vendor's title acquires an immediate indefeasible title. In the case where the vendor's title is good but the instrument which was used by a purchaser for registration is void or voidable, the effect on such registration will only confer on the person in whose

name the land is registered, what is usually referred to as deferred indefeasibility — see *Gibbs v Messer*. Under this principle, the registration of the insufficient or void instrument can be set aside.

[37] Applying the principles as we have set out, it is plain that the developer Natarjaya, after receiving the purchase price and surrendering possession of the said property to the plaintiff, became a bare trustee for the plaintiff. Accordingly, Natarjaya had no legal capacity to enter into any agreement with the fourth defendant. The common law rule of *nemo dat quod non habet* comes leaping to mind. In short, Natarjaya could not give a better title than what it had. The *nemo dat* rule, however, is limited in its application by s 340 of the NLC in that subsequent purchasers may still acquire an indefeasible title pursuant to s 340(3) as long as they can show that the title or interest was acquired in good faith and for valuable consideration. In the present case, it was common ground that the fourth defendant was not a subsequent but an immediate purchaser.

[38] There was also some question of a lack of pleading in this regard. However, a perusal of the pleadings shows this issue was pleaded in para 23 of the statement of claim as follows:

> 23. Plaintif menegaskan bahawa sebarang pindahmilik Hartanah tersebut adalah terbatal, tidak sah dan/atau tidak berkuatkuasa disisi undang-undang sejak dari mula memandangkan bahawa Defendan Pertama, tidak mempunyai sebarang hak untuk menjual Hartanah tersebut. Sebarang transaksi dan/atau pindahmilik Hartanah tersebut kepad Defendan Keempat dan/atau Defendan Kelima juga adalah tidak sempurna dan boleh disangkal ('*defeasible*').

[39] This issue was also raised in the evidence of the plaintiff as follows:

> Q29 Adakah pindah milik Hartanah tersebut yang dilakukan daripada Defendan Pertama kepada Defendan Keempat sah?
>
> A: Saya menegaskan bahawa sebarang pindahmilik Hartanah tersebut adalah terbatal, tidak sah/atau tidak berkuatkuasa disisi undang-undang sejak dari mula memandangkan bahawa Defendan Pertama tidak mempunyai sebarang hak untuk menjual Hartanah tersebut. Sebarang pindahmilik Hartanah tersebut kepada Defendan Keempat dan/atau Defendan Kelima juga adalah tidak sempurna dan boleh disangkal ('*defeasible*'). Defendan Keempat juga tidak pernah berhak melakukan pendaftaran strata Hartanah tersebut keatas namanya memandangkan bahawa sayalah yang merupakan tuanpunya Hartanah tersebut dan bukan Defendan Keempat.

[40] As was indicated at the outset, the claim against Natarjaya was based on fraud as was the claim against the fourth defendant. Natarjaya and its directors

(the second and third defendants) did not file any appearance and failed to turn up in court. The learned JC was then entitled to rule, as he did, that based on the decision in *Kamarulzaman*, the finding of fraud was taken to have been proved against the first, second and third defendants and this finding would also be binding on the other defendants in the action.

[41] With this finding, it further confirms the legal position that the purchaser fourth defendant could not have obtained good title from Natarjaya. The subsequent sale and purchase agreement entered into between Natarjaya and the fourth defendant was therefore void. It must also follow that all transactions relating to this sale including the documents or instruments used are similarly all void. The net effect is that the fourth defendant is disentitled to the property and the plaintiff must remain its rightful owner.

CONCLUSION

[42] In the circumstances, and for the reasons we have stated which differ somewhat from those provided by the learned JC, we find no reason to interfere in the final decision of the High Court. The appeal is therefore dismissed with costs. The orders of the High Court are affirmed. We will now hear parties on the appropriate order as to costs.

Appeal dismissed with costs.

Reported by Kohila Nesan